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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

TABLE 10.

— *continued from page 10* —

[Decided October 19, 1994]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

PACIFIC REFINING COMPANY

TSCA Appeal No. 94-1

FINAL DECISION AND ORDER

Decided October 19, 1994

Syllabus

U.S. EPA Region IX appeals the Presiding Officer's civil penalty assessment for one count of a multi-count complaint filed against Pacific Refining Company (Pacific) under § 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614. The Region contends that the \$2850 penalty assessed against Pacific for violating a regulation pertaining to the marking of electrical transformers containing polychlorinated biphenyls (PCBs) is insufficient. It is undisputed that Pacific failed to mark the fence enclosing one of its PCB transformers, as required by 40 C.F.R. § 761.40(j). The Presiding Officer classified the violation as a "minor" marking violation under the Agency's 1990 PCB Penalty Policy, because the transformer itself was marked, and the transformer marking was visible through the fence. The Region contends that the violation should have been classified as a "major" marking violation, carrying a \$13,000 penalty, because Pacific did not comply with the enclosure marking regulation, and a mark on the transformer itself might not warn of the presence of PCBs in the event of a transformer fire.

Held: The Board concludes that the Presiding Officer erred in determining the amount of the penalty for the violation. It is undisputed that Pacific fulfilled none of the requirements of § 761.40(j), and under the fire emergency conditions envisioned by the Agency in promulgating § 761.40(j), a mark on the transformer itself would not provide sufficient notice to emergency responders of the presence of PCBs. The Board determines that the violation is properly classified as a "major" marking violation, and assesses a gravity-based penalty of \$13,000 against Pacific. However, because Pacific acted promptly to remedy the violation, the Board concludes that a 15% downward adjustment in the penalty is appropriate, and therefore assesses a total civil penalty of \$11,050 against Pacific.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

U.S. EPA Region IX appeals an order of the Presiding Officer assessing a civil penalty against Pacific Refining Company (Pacific) for alleged violations of § 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614, and the rules implementing TSCA relating to the marking of polychlorinated biphenyls (PCBs), 40 C.F.R. Part 761, Subpart C. In April 1991, Region IX filed a 17-count complaint against Pacific alleging various violations of the PCB regulations, and proposing civil penalties totalling \$200,000. The complaint stemmed from an inspection of Pacific's petroleum feedstock refining facility in March 1990 that disclosed alleged violations of the PCB regulations relating to the inspection, registration, marking, documentation, and disposal of PCBs. Following an evidentiary hearing, the Presiding Officer found Pacific liable on eight of the 17 counts, and assessed a total civil penalty of \$62,938. Region IX appeals the assessment of a \$2850 penalty for one of these eight counts.

In his Initial Decision, the Presiding Officer determined that Pacific was liable on Count XI of the complaint, which charged Pacific with a violation of 40 C.F.R. § 761.40(j). That section requires appropriate marking of the means of access to a PCB transformer. The Presiding Officer assessed a civil penalty of

\$3000 for Count XI.¹ On appeal, Region IX contends that the Presiding Officer erred in determining the amount of the penalty assessed for Count XI, and that proper application of the TSCA PCB penalty guidelines would result in a penalty of \$13,000 for Count XI. The amount of the penalty imposed for Count XI is the sole issue on appeal. For the reasons set forth below, we conclude that the penalty guidelines were not correctly applied with respect to Count XI. We instead assess a civil penalty against Pacific in the amount of \$11,050 for violation of 40 C.F.R. § 761.40(j).²

I. BACKGROUND

The facts underlying the charge in Count XI of the complaint are not in dispute. Region IX's inspection of Pacific's facility included the inspection of PCB Transformer 2375/480. The transformer was enclosed by a chain-link fence, through which the transformer was readily visible. The parties agree that the transformer was subject to two relevant PCB marking requirements. First, in accordance with 40 C.F.R. § 761.40(a)(2), the transformer itself was required to be marked with "M_L" indicating that it was, in fact, a PCB transformer.³ Second, in accordance with 40 C.F.R. § 761.40(j), the fence enclosing the transformer was also required to be marked with "M_L."⁴ Transformer 2375/480 was properly marked, but no mark of any kind suggesting the presence of PCBs was placed on

¹ The Presiding Officer assessed gravity-based penalties totalling \$66,250 for all eight counts upon which Pacific was found liable, then allowed a 5% penalty reduction for "attitude," thus resulting in a total penalty of \$62,938. In light of the 5% adjustment, the total penalty attributable to Count XI is \$2850 (\$3000 less 5%).

² Because neither party has appealed the penalties assessed for the other seven counts, our opinion does not address the remainder of the Presiding Officer's penalty assessment.

³ In accordance with the regulations, the mark itself must conform to the distinctive PCB caution notice illustrated at Figure 1 of 40 C.F.R. § 761.45; "M_L" is simply the regulatory shorthand method for referring to the complete mark.

⁴ 40 C.F.R. § 761.40(j) provides that:

(1) [A]s of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates and manhole covers, to a PCB Transformer must be marked with the mark M_L as required by paragraph (a) of this section [relating to marking of PCB Transformers].

* * * * *

(3) Any mark placed in accordance with the requirements of this section must be placed in the locations described in paragraph (j)(1) of this section and in a manner that can be easily read by emergency response personnel fighting a fire involving this equipment.

the fence surrounding the transformer. Region IX therefore charged Pacific with a violation of 40 C.F.R. § 761.40(j) for failure to mark the means of access to a PCB transformer.

In his Initial Decision, the Presiding Officer agreed that Pacific was liable for a violation of § 761.40(j). In assessing a penalty for the violation, the Presiding Officer looked to the framework established in the *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, 45 Fed. Reg. 59,770 (Sept. 10, 1980) (1980 Guidelines), and in the Agency's 1990 revised PCB Penalty Policy (1990 Penalty Policy).⁵ The Presiding Officer rejected Region IX's contention that the violation constituted a "major marking violation" within "circumstance level 2" of the 1990 Penalty Policy's Gravity Based Penalty Matrix. The Policy defines a circumstance level 2 major marking violation as:

[A] situation where there is no indication to someone unfamiliar with PCBs that PCBs are present, such as failure to label the access to a PCB Transformer or failure to label the transformer.

1990 Penalty Policy at 11. For circumstance level 2 major marking violations of "significant" extent, the Penalty Policy suggests a penalty of \$13,000. *Id.*⁶

The Presiding Officer instead agreed with Pacific that the evidence suggested only a "circumstance level 5" "minor marking violation" of significant extent under the matrix. The 1990 Penalty Policy defines circumstance level 5 minor marking violations as:

⁵ TSCA provides that in assessing a civil penalty, the Presiding Officer shall take into account:

[T]he nature, circumstances, extent and gravity of the violation or violations and with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

TSCA § 16(a)(2)(B). TSCA penalties are usually determined in two stages in accordance with the 1980 Guidelines and the 1990 Penalty Policy. First, a "gravity based penalty" is calculated from a matrix which takes into account both the probability of harm caused by the violation and the extent of potential damage from the violation. Second, upward or downward adjustments may be made to the penalty based on the other statutory factors: ability to pay and effect on ability to continue in business (which are considered as one factor); prior violations; culpability; and "such other matters as justice may require." 45 Fed. Reg. 59,770.

⁶ The determination of the "extent" of the violation is based on the quantity of PCBs involved; that aspect of the penalty determination is not at issue.

[S]ituations in which some requirements of the rule have not been followed, but there is sufficient indication that PCBs are present and the PCB Items can be identified.

1990 Penalty Policy at 12. For such violations, the Penalty Policy suggests a penalty of \$3000.⁷

The Presiding Officer's rationale for imposing the lower penalty was that the PCB M_L mark located on the transformer was visible through the fence surrounding the transformer, and that the mark was visible from the point of access to the transformer enclosure. He concluded that "there is a reasonable likelihood that someone entering the enclosure would see the marking on the transformer." Initial Decision at 15.

On appeal, the Region contends that the Presiding Officer erred in assessing a circumstance level 5 minor marking violation penalty for Count XI because Pacific did not comply with any of the requirements of 40 C.F.R. § 761.40(j), and there was no other sufficient indication that PCBs were present inside the transformer enclosure. Pacific contends that the Presiding Officer's penalty assessment was well within the discretion afforded to him under the applicable regulations. While Pacific acknowledges that it violated the PCB marking regulations to some degree, it contends that the presence of the M_L mark on the transformer itself removed the violation from the ambit of circumstance level 2 under the Penalty Policy, because the mark on the transformer was, in this instance, sufficient indication that PCBs were present.

II. DISCUSSION

The regulations governing this proceeding give the Presiding Officer the discretion "to assess a penalty different in amount from the penalty recommended

⁷ The Penalty Policy sets forth only two circumstance levels for violation of the PCB marking regulations. "Major" violations are considered in the "high range" with respect to probability of damages from the violation, and placed in "circumstance level 2," the second-highest circumstance level on the matrix. "Minor" violations are considered in the "low range" with respect to probability of damages, and placed in "circumstance level 5," the second-lowest circumstance level on the matrix. Penalty Policy at 11-12. No marking violations are included within the "medium range" of the matrix. This omission is logical in light of the way the Agency defined marking violations: the violation is either "major," *i.e.* a failure to mark, or "minor," *i.e.* partial compliance with marking requirements that satisfies the regulations in the most important respects, by indicating the presence of PCBs and identifying the PCB items (for example, by using a mark that conveys the necessary information, but does not conform exactly to regulatory requirements). *See id.*

to be assessed in the complaint, [so long as he] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). Although the Presiding Officer must "consider" any penalty guidelines, he is not bound by them. *Id.* The regulations also give the Board the discretion to increase or decrease the penalty assessed in the initial decision. *Id.* § 22.31(a). When the penalty assessed by the Presiding Officer falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *In re Ray Birnbaum Scrap Yard*, TSCA Appeal No. 92-5 at 5 (EAB, Mar. 7, 1994); *Bell & Howell Co.*, TSCA Appeal No. TSCA-V-C-033, 034, 035 at 19 (JO, Dec. 2, 1983). We find such error in the Presiding Officer's rationale in this case.

As noted above, the Presiding Officer did not impose the penalty suggested for a circumstance level 2 violation because, in his view, the marking on the transformer was adequate to alert someone entering the enclosure to the presence of PCBs. Initial Decision at 15. This reasoning is flawed in light of the plain language of § 761.40(j) and the purpose underlying the promulgation of the regulation.

Subsection (j) was added to the existing PCB marking regulations in 1985 as part of a comprehensive effort to reduce the environmental and human health risks posed by fires in electrical transformers containing PCBs. *Polychlorinated Biphenyls in Electrical Transformers, Final Rule*, 50 Fed. Reg. 29,170 (July 17, 1985). At that time, the PCB regulations already required marking of the PCB transformer itself. *See* 44 Fed. Reg. 31,542 (May 31, 1979). In 1985 the Agency determined that marking of the access to PCB transformers, *in addition to* the marking of the transformer, would help protect fire responders from potential exposure to PCBs. In that regard, the Agency determined that "the labeling of the exterior of transformer locations is necessary to insure that emergency response personnel arriving at the scene of a fire know that the fire involves a transformer that contains PCBs." *Id.* at 29,189. Thus, the Agency stated that:

EPA has required the labeling of the exterior of all PCB Transformers with the mark M_L. This means that doors, fences, hallways, and other easily markable means of access to PCB Transformer locations must be marked with PCB identification labels. These labels must be prominently displayed and visible to emergency response personnel in the event of a fire involving this equipment.

Id. at 29,196.

In promulgating § 761.40(j), the Agency did not distinguish between transformer enclosures that provide a clear view of the transformer and those that do not. All "means of access" (including, specifically, "fences") must be marked. 40 C.F.R. § 761.40(j). Further, the mark required by § 761.40(j) must be placed "in a manner that can be easily read by emergency response personnel fighting a fire involving this equipment." *Id.* § 761.40(j)(3). As the Region points out, a fire in a PCB transformer could obscure or destroy the mark placed on the transformer itself. Region's Brief at 6. It is obvious that the Agency contemplated such a scenario when it determined that marking the transformer enclosure would reduce the risk of PCB exposure to emergency response personnel, by insuring that responders were aware that the involved transformer contained PCBs. *See* 50 Fed. Reg. at 29,189 (exterior labeling insures that responders know transformer fire involves PCBs); 49 Fed. Reg. 39,966, at 39,981 (*Proposed Rule*; exterior labeling may reduce exposure to firemen and others in vicinity of fire). An exterior labeling requirement would have been unnecessary if the Agency had believed that a mark on the burning transformer itself provided adequate notice of the presence of PCBs. In the case of a transformer fire, the relative opacity of the enclosure is irrelevant if the fire obscures or destroys the mark placed on the transformer itself. We thus conclude that a mark on the transformer itself does nothing to further the purposes for adopting a separate enclosure marking requirement, and cannot be viewed as serving as partial compliance with the very explicit requirements of § 761.40(j).⁸

Further, we cannot agree with Pacific's contention that the Presiding Officer's penalty assessment was correct in view of the fact that the primary fire response personnel in this case were Pacific's employees who had been trained in the location of PCB transformers. *See* Pacific's Brief at 6. As the Agency explained in the preamble to § 761.40(j), the risk of PCB exposure is not limited to a facility's PCB-trained personnel:

An industrial PCB Transformer fire during off-hours
would be more likely to expose volunteer and municipal salaried
firefighters than fires during normal operating hours, when

⁸ In this regard, we find no merit in Pacific's claim that § 761.40(j) is part of one "rule" that includes the transformer marking requirement, and that Pacific met "some requirements of the rule" by marking the transformer. Pacific's Brief at 6-7. As noted, § 761.40(j) establishes a specific marking requirement that is independent of the regulation requiring marking of the transformer; compliance with one regulation does not negate or mitigate failure to comply with the other.

company fire brigades would have primary responsibility for initial emergency response.

50 Fed. Reg. at 29,184. The Agency plainly considered that off-site fire brigades might be required to respond to a PCB-related fire, despite the existence of a company fire brigade. Thus, the presence of a trained, on-site fire brigade is not a circumstance that mitigates complete failure to comply with the § 761.40(j) marking requirement.

Based on the foregoing, we conclude that the Presiding Officer erred in his penalty assessment by basing his consideration of the "circumstance level" on factors that do not impact whether there has been any compliance with the specific and independent *enclosure* marking requirement of § 761.40(j): Pacific's compliance with the *transformer* marking requirement, and the visibility of the transformer's mark through the enclosure under normal conditions. Because it is undisputed that the transformer enclosure bore no mark suggesting the presence of PCBs, as required by 40 C.F.R. § 761.40(j), we find that the violation should be classified as a circumstance level 2 major marking violation, in accordance with the 1990 Penalty Policy ("there is no indication to someone unfamiliar with PCBs that PCBs are present, such as failure to label the access to a PCB Transformer or failure to label the transformer."). The fact that it is undisputed that under normal, non-emergency conditions, someone standing outside the enclosure could have seen the PCB mark on the transformer and would have had "sufficient indication that PCBs are present" (consistent with a circumstance level 5 violation) does not alter our analysis. Section 761.40(j) was intended to provide notice of the presence of PCBs in the event the PCB transformer was involved in a fire. *See* § 761.40(j)(3); 50 Fed. Reg. at 29,189. In such an instance, with no mark on the enclosure, there would be "no indication" to someone unfamiliar with the facility (such as an off-site emergency responder) that PCBs were present. In that event, conditions consistent with a circumstance level 2 violation would exist with respect to the kind of harm § 761.40(j) was intended to prevent. Therefore, in accordance with the penalty matrix, we assess a gravity-based penalty in the amount of \$13,000 against Pacific for violation of § 761.40(j).

We next turn to the consideration of penalty factors relating to the violator to see if any adjustment in the base penalty is appropriate. *See* 1990 Penalty Policy at 14-19. Although the Region has not addressed the propriety of an adjustment in the base penalty, it is within the Board's authority to make adjustments to the gravity-based penalty in appropriate circumstances. *See* 40 C.F.R. § 22.31(a). For the reasons explained below, we agree with Pacific that a downward adjustment in the base penalty is appropriate.

One adjustment factor described in the Penalty Policy is "attitude" of the violator, including "whether the violator is making good faith efforts to comply with the appropriate regulations; the promptness of the violator's corrective actions; and any actions taken to minimize harm to the environment." 1990 Penalty Policy at 17. The Penalty Policy suggests a maximum downward adjustment of 15% for good "attitude." *Id.* Pacific contends that several factors support a downward reduction on this basis: Pacific's compliance with the enclosure marking requirement within one day of the inspection; its "cooperative and compliant" attitude during the inspection; and its efforts to implement better internal controls to ensure compliance with environmental laws. Pacific's Brief at 8.

As explained *supra*, n. 1, the Presiding Officer applied a flat 5% downward adjustment to all counts of the complaint in light of Pacific's "attitude and conduct," but did not explain whether individual counts might have merited greater reductions. Initial Decision at 22. The Presiding Officer stated only that he declined to apply a 15% adjustment because of Pacific's actions respecting counts unrelated to Count XI, specifically Pacific's delays in making certain wipe tests following the inspection. Initial Decision at 22-23. There is no dispute, however, (and the Presiding Officer acknowledged) that Pacific marked the enclosure surrounding Transformer 2375/480 the day after the inspection. The Penalty Policy suggests that "[a] company would generally qualify for a downward adjustment of a maximum of 15% if it immediately halts the violative activity and takes steps to rectify the situation." 1990 Penalty Policy at 17. Because of Pacific's immediate action in remedying its violation of § 761.40(j), we conclude that a 15% reduction in the gravity-based penalty is appropriate. Accordingly, we assess a total civil penalty of \$11,050 against Pacific.

III. CONCLUSION

For the foregoing reasons, a civil penalty of \$11,050 is assessed against Pacific Refining Company in accordance with § 16(a) of the Toxic Substances Control Act for violation of 40 C.F.R. § 761.40(j), as described in Count XI of the complaint. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of service of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA -- Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

So ordered.⁹

⁹ This order does not affect Pacific's obligation to pay the remaining \$60,088 civil penalty assessed by the Presiding Officer, and not appealed to the Board, in accordance with the order set forth in the Initial Decision.